Supreme Court, U.S.
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NO. 85-2048

In the Supreme Court of the United States

OCTOBER TERM, 1985

JAMES R. PELLERIN,

Petitioner

VERSUS

TUDOR CONSTRUCTION COMPANY, ET AL

Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Seventh Amendment to the Constitution of the United States is applicable to a Louisiana state court jury trial in which the trial court granted defendant's motion for a Judgement NOV.

2. Whether the Louisiana First Circuit Court of Appeals and the Louisiana Supreme Court erred in affirming the granting of a Judgement NOV by the trial court in this case in that they violated the Seventh Amendment to the Constitution of the United States.

LIST OF INTERESTED PARTIES

The undersigned counsel of record for the plaintiff-appellant certifires that the following listed partiew and organizations have a interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualifications of recusal.

1. JAMES PELLERIN PLAINTIFF-APPELLANT

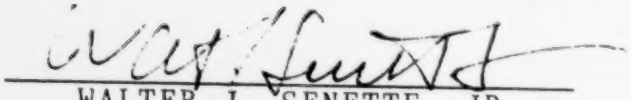
2. TUDOR CONSTRUCTION CO. DEFENDANT-APPELLEE

3. TREVER C. PRICE DEFENDANT-APPELLEE

4. COMMERCIAL UNION INSURANCE COMPANY DEFENDANT-APPELLEE

5. WALTER J. SENETTE, JR. ATTORNEY FOR THE APPELLANT (BORNE, SENETTE AND DUPLANTIS)

6. JOHN BLACKWELL ATTORNEY
FOR THE APPELLEE



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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1968

JAMES PELLERIN, PETITIONER

VERSUS

TUDOR CONSRUCTION CO. ET AL,

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI

TO THE

SUPREME COURT OF THE UNITED STATES

Petitioner prays that a writ of certiorari issue to review the judgment of the Louisiana Supreme Court denying certiorari on May 7, 1986 and of the Louisiana First

Circuit Court of Appeals entered on November 19, 1985.

OPINIONS BELOW: PELLERIN V. TUTOR CONSTRUCTION CO., 479 So. 2d 498, 1st Cir. Ct. of App. (La. 1985) and PELLERIN V. TUTOR CONSTRUCTION CO., La. Sup. Ct. No. 86-c-0199 writs denied March 7, 1986.

JURISDICTION: The judgment of the Louisiana Supreme Court was entered on March 7, 1986. The jurisdiction of the Court is invoked under 28 U.S.C. Section 1257.

THE QUESTIONS PRESENTED:

1. Whether the Seventh Amendment to the Constitution of

the United States is applicable to a Louisiana state court jury trial in which the trial court granted defendant's motion for a Judgement NOV and in the alternative a new trial.

2. Whether the Louisiana First Circuit Court of Appeals and the Louisiana Supreme Court erred in affirming the granting of a Judgement NOV and in the alternative a new trial by the trial court in this case in that they violated the Seventh Amendment to the Constitution of the United States.

STATEMENT: This is a personal injury case which involves an "executive officer-employers liability" lawsuit which has been

tried twice before juries in Franklin, St. Mary Parish, Louisiana. The first jury rendered a verdict of $300,000.00 DOLLARS in favor of plaintiff and against the defendant-executive officer. The trial court granted a new trial on the issue of liabilty and writs were taken to the First Circuit Court of Appeals. The First Circuit accepted writs and ultimately upheld the grant of the new trial, (See Pellerin v Tudor Construction Co., 414 So. 2d 403, 1st Cir. 1982) (hereinafter referred to as Pellerin I).

Writs were denied by the Louisiana Supreme Court (Pellerin v. Tudor Construction Co., 420 So.2d 455, LA 1982) and in due course the matter was tried before

a second jury. This second jury rendered a verdict in favor of the plaintiff. The defendants then filed a motion requesting the Court to enter a judgment notwithstanding the verdict of the second jury or in the alternative, to grant a new trial on the issue of the liability on the grounds that the second verdict was also contrary to the law and evidence. The trial court entered a JNOV (and in the alternative granted the motion for a new trial) and the plaintiff appealed to the First Circuit. The First Circuit affirmed the granting of the JNOV. The plaintiff applied for writs of Certiorari and/or Review to the Louisiana Supreme Court which were denied by a margin of one justice.

REASONS FOR GRANTING THE WRIT:

The jury dockets of the courts of Louisiana and of the United States are grossly overwhelmed with cases requiring jury trials. Despite this fact and in violation of the Seventh Amendment a Louisiana state trial court, in this case, reweighed and overturned the decisions of two juries in favor of the plaintiff. The time and effort used in the second trial could have been used on other pending cases.

This case represents a growing trend of trial and appellate courts in the United States to take cases away from the jury and violates the Seventh Amendment.

FACTS, LAW AND ARGUMENT: As stated, this is a suit in tort, filed by the plaintiff, JAMES PELLERIN, as a result of personal injuries he sustained while employed by the Tudor Construction Company (hereinafter Tudor). Made defendants herein were T. Clayton Price, Tudor's construction superintendant, and executive officer of Tudor, and the Commerical Union Assurance Company, the insurer of T. Clayton Price. According to Louisiana law at the time of the accident an employee was able to sue his employer's "executive officers" for their individual negligence.

The facts, developed at both trials, established that on the date in question, the plaintiff,

JAMES PELLERIN, was a carpenter employed by Tudor. He was described by his employer as a "good, conscientious worker who did everything he was told to do, in the way he was told to do it." The defendant, T. Clayton Price, the person in charge of safety on the job site and the person in charge of assigning the workmen their particular duties.

On the date of the accident, the parties were engaged in the construction of a shopping center in Morgan City, Louisiana. Between 6:00 a.m. and 7:00 a.m., as was his custom, plaintiff left his residence in Verdunville, some twenty (20) miles west of Morgan City, enroute to the job site. Plaintiff returned to Verdunville

shortly after leaving, having encountered heavy rain and wind along the route. The weather conditions led him to believe that work would be called off that day. The plaintiff's wife called the job site at the direction of the plaintiff in an effort to determine whether or not Mr. Pellerin should report to work. He was advised to report to the job site. Upon his arrival at the job site, the plaintiff was assigned the task of finishing the window frames for the other wall of one of the buildings in the mall. This job assignment was situated under a twenty foot (20') overhang some twenty-five (25) to thirty (30) feet inside the overhang, but was otherwise exposed to the elements.

A line of thunderstorms had passed through the Morgan City area during the early morning hours and these storms were accompanied at times by high winds. Skys were overcast and the high humidity levels recorded for that day coupled with other climatological conditions accounted for the accumulation of moisture on the exposed surfaces under the overhang.

In order to accomplish his assigned task, plaintiff worked from a scaffold placed adjacent to the otherwise completed wall. This wall was covered with visqueen and bricks had been placed over the visqueen to keep the wind from blowing the visqueen off.

The particular task assigned to the plaintiff this day required him to mount the scaffold and measure the area to be framed; plaintiff would then dismount the scaffold via the mounting rungs located at the sides of the scaffold and walk several feet to the area where his power tools were located. At this point he would cut the lumber in accordance with his previous measurements, remount the scaffold and secure the lumber in the window frame.

Throughout this period of time, plaintiff had tied to his person, a large carpenter's nail bag within which was located his socket wrench, bolts and sockets. The platform boards atop the scaffold extended about twelve

inches (12") on either end over the scaffold and had to be negotiated with each mount and dismount. .

As the plaintiff completed each section, he would dismount so that his helper, Phillip Frederick, could move the scaffold into position to enable the plaintiff to work on the next section along the line.

With each succesive mounting and dismounting of the scaffold, the mounting rungs and the scaffolding became more and more slippery as did the soles of the shoes worn by the plaintiff. As the plaintiff neared completion of this particular assignment, it became necessary for his helper to move the scaffold to the next section. The plaintiff became

concerned for his safety and, rather than dismount the slippery scaffold, he took a step onto the adjacent wall thinking that such a maneuver would be the safer course of action. Unfortunately, in attempting this maneuver, plaintiff stepped upon one of the bricks anchoring the visqueen. In so doing, he fell to the terrazo floor opposite the wall and sustained the injuries complained of.

Plaintiff testified that although he looked prior to stepping upon the wall, he was unable to see the loose brick due to the absence of adequate lighting in the area and the fact that the platform boards hung over the edge of the scaffold about twelve inches.

In determining whether to grant a Judgment Notwithstanding the Verdict, Louisiana has adopted the Federal standard. This case offers the court an opportunity to firmly establish the exact standard for a JNOV and to decide whether it is a violation of the Seventh Amendment for a state court to apply the wrong standard.

A Judgment NOV (Art. 1811) is a recently adopted post-trial procedural device, the source of which is the Federal Rules of Civil Procedure. In the recent case of Rougear v. Comm. Union Ins. Co., 432 So.2d 1162 (3rd. Vir.1983), the Third Circuit specifically held that a state court should look to federal law and jurisprudence in interpreting Article 1811. Based on

this Federal jurisprudence the court in Rougeau stated that:

> ".....the standard for determining the propriety of granting a judgment not-withstanding the verdict is the same as used to determine whether a directed verdict should be granted....."

The standard cited with approval by the court in Rougeau is that found in the federal case of Boeing v. Shipman, 411 F.2d 365 (5th Cir. 1969). In Boeing the court stated that:

> "On motions for directed verdict and for judgment notwithstanding the verdict, the Court should consider all of the evidence, not just that evidence which supports the non-movers' case--- but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelm-

ingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury. The motions for directed verdict and Judgment NOV should not be decided by which side had the better case, nor should they be granted only when there is a complete absence of probative facts to support a jury verdict. There must be a conflict in substantial evidence to create a jury question. However, it is the function of the jury as the traditional finder of the facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses." (emphasis added)

This language has been quoted with approval in both Pellerin II, supra and in Campbell, supra.

In A.H. Spurlin v. General Motors Corporation, 528 F.2d 612 (CA 5,1976), the court held:

> "Courts are not free to re-weigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable." Citing Tennant v. Peoria and Pekin Union Ry, 321 U.S. 29,35.

In U.S. Weyerhauser Co. v. Bucon Construction Co. 430 F.2d 420 (Ca 5, 1970), at page 423 the court held:

> "In passing on a motion

> for a directed verdict, or for a judgment notwithstanding the verdict, the court does not exercise discretion, but decides a pure question of law, that is, whether the evidence, considered in a light most favorable to the party against whom the motion is directed, affords substantial support for a verdict in his favor." (emphasis added)

In National Polyma-Product, Inc., v. Bourg-Warnar Corp., 680 Fed.2d 171 (CA 6,1981) at page 178, the court held:

> "Thus, if there is sufficient evidence to raise a question of fact for the jury judgment notwithstanding the verdict is improper. In determining whether the evidence is sufficient, the trial court may neither weigh the evidence, pass on the credibility of witnesses now substitute its judgment for that of the jury. In determining the motion, the trial court must view

> the evidence in a light most favorable to the party against whom the motion is made.

In addition, in deciding whether to grant a JNOV, a court may not consider credibility or submit it's judgment for that of the jury. McClain v. Holmes, 460 So2d 681, (1st Cir. 1984). In a JNOV it is not the trial court's job to evaluate the evidence, judge credibility and pass judgment; that is the role given to the jury. A trial court's duty is to review the jury's finding to determine whether or not the verdict is such that reasonable and fair minded jurors in the exercise of impartial judgment might reach the conclusion rendered, if so, the jury's decision should not be altered.

Therefore, in the instant case, for the trial court to have been correct in granting a JNOV on the issue of James Pellerin's contributory negligence, it was required to find that the evidence taken with all reasonable inferences in favor of the petitioner, and without any independent consideration of credibility, showed that it was impossible for a reasonable and fair minded jury to find that James Pellerin was free from negligence. If this evaluation by the trial court was not correct and the record shows that sufficient evidence exists so that a reasonable and fair minded jury could have found Mr. Pellerin free from contributory negligence, then the trial court, the Court of

Appeals and the Supreme Court were in error.

This is precisely what the plaintilff believes has occured. The petitioner believes that the conclusions of two different juries, a proper review of the record and a correct application of the law, clearly illustrate that the trial court's granting of a JNOV was improper. This suit has been heard by two different St. Mary Parish juries and both have found that James Pellerin was not negligent in his actions.

The decisions of the Courts below are in conflict with the substantive law of Louisiana on employee negligence. In the case of Esco v. Smith, 468 So.2d 1169, (LA 1985) Justice Calogero points out

that: " A workman's superior cannot create or permit danger and send the workman into it and escape liability on a theory that the workman was contributorily negligent by exposing himself to the danger". Furthermore, the defendant cannot escape responsibility by contending that the employee, who was forced (by the lack of safe equipment or by the unsafe conditions of the work place) to use alternative methods to perform his job, used an unsafe or unreasonable method; unless the defendant can show that there were several obvious alternative methods and the employee chose an unreasonably unsafe method over one which was not unreasonably unsafe. Payton v. Travelers, 373 So2d 1324,

(4th Cir. 1979) Under Louisiana law the test for employee contributory negligence in an exectutive officer case is found in Martinez v. USF&G, 423 So2d 1088, (LA 1982). Foremost in this test is the relative control over the employee's situation illustrated by the knowledge of the dangerous situation, obviousness of the danger, voluntariness in encountering the danger by the employee, and the ability to eliminate the danger.

The evidence clearly shows and two different juries agreed that Mr. Pellerin was not negligent. Mr. Pellerin stated that he did not see the loose brick and did not appreciate the danger he was about to encounter. Reasonable evidence exists to support a finding that

Mr. Pellerin was never told that stepping on the brick wall presented a great danger to himself. It is very clear from the evidence that Mr Price was in the best position to prevent this accident. It was he who forced Mr. Pellerin to come to work despite the rain. It was Price who two juries believed to be negligent, not Mr. Pellerin. The Esco case obviously supports the reality that an employee refuses to follow his employer's instructions at his own employment peril and therefore should not be held to be contributarily negligent for following orders.

Of course, an employee must not knowingly expose himself to an obvious hazard. However, there

exists much evidence and two different juries obviously agreed, that Mr. Pellerin did not see the loose brick and was not aware of the hazard in climbing the wall. Two juries also believed that Mr. Pellerin's actions in stepping a few inches onto the brick wall instead of climbing down five feet of wet metal scaffold rungs was not negligence. The evidence of whether or not Mr. Pellerin was warned not to climb the wall is far from conclusive and much evidence exists that he was not told with sufficient clarity to put him on notice that it was a danger to his safety.

It should be noted that the burden at the JNOV was not on Mr. Pellerin to prove that his version

of the facts was correct. The jury had already expresed its belief in his version by decididng the case in his favor. The trial judge and the Court of Appeals in reversing the jury's finding necessarily found that the two different juries which believed the version of the facts offered by Mr. Pellerin were unreasonable and that there existed insufficient evidence by which a reasonable and fair minded jury could find as they did.

Plaintiff contends this is in error. A through review of the facts, the jurisprudence on comparative negligence in executive officer cases and especially the Esco and Martinez cases, will lead to the conclusion that the trial court and the Court of Appeals

incorrectly applied the rule of JNOV and the verdicts returned by two different juries should be re-instated.

The decision of the Louisiana Supreme Court in denying plaintiff writ to review the decision of the court of appeals and the trial court let stand not only the JNOV but also the grant of a new trial. On this issue the plaintiff argues first, that the standard set out in Pellerin I should not be the standard used in Louisiana and that it violates both the Louisiana Constitution and the Seventh Amendment to the United States Constituion.

CONCLUSION: The decision by the First Circuit Court of Appeals and the Louisiana Supreme Court in this

negligence by twenty four of his fellow citizens, the same trial court judge twice reversed their case upholding the trial court's granting of a Judgment Notwithstanding the Verdict or in the alternative a New Trial sounds the death knell for the jury system in Louisiana. Two juries representing twenty-four different Louisiana citizens participated in finding in favor of Mr. Pellerin and against the defendant in this case. On both occasions, the juries decided Mr. Pellerin was not contributorily negligent and his executive officer, T. Clayton Price, was negligent under the law.

However, after the successful resolution of the questions of liability and contributory

decision and substituted his judgment for that of the jurors.

James Pellerin prays that this court accept his plea to review this miscarriage of justice and decide whether in Louisiana, the Constitutionally guaranteed right to trial by jury is real or merely a sham.

Plaintiff recognizes that under very restrictive circumstances, the trial judge has a duty to reverse the jury's verdict. In the case before this court, however, the reasonable conclusions of two juries have been improperly ignored.

By Counsel,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleadings have been served or all counsel of record by placing a copy of same in the United States mail, postage prepaid on this 5TH day of JUNE 1986.

Walter J. Semette

WALTER J. SEMETTE, JR.

APPENDIX A

JAMES R. PELLERIN

VERSUS

TUDOR CONSTRUCTION COMPANY, ET AL

STATE OF LOUISIANA
COURT OF APPEAL

FIRST CIRCUIT
NUMBER CA 84 1018

ON APPEAL FROM THE SIXTEENTH JUDICIAL DISTRICT COURT FOR THE PARISH OF ST. MARY
HONORABLE ROBERT E. JOHNSON, JUDGE PRESIDING

BEFORE: LOTTINGER, COLE AND CRAIN, JJ.

COLE, J. NOV 19 1985

The question presented on appeal is whether the trial court properly rendered a Judgment Notwithstanding the Verdict in an executive officer negligence action, finding no liability on the part of the defendants.

The posture of this proceeding has been set forth in *Pellerin v. Tudor Const. Co.*, 414 So.2d 403 (La. App. 1st Cir. 1982), writ denied, 420 So.2d 455 (La. App. 1st Cir. 1982), writ denied, 420 So.2d 455 (La. 1982), as follows:

> "This is an 'executive officer' suit wherein plaintiff, James R. Pellerin, sued his employer, Tudor Construction Company, Inc., his employer's insurer, Commercial Union Assurance Company, and T. Clayton Price, superintendent for the plaintiff's employer. The suit is for personal injury damages sustained on February 6, 1976, when plaintiff slipped and fell off a wall while in the course of his duties as a carpenter, causing a serious head injury. Tudor Construction Company was dismissed from the suit on a peremptory exception of no cause of action on the grounds that it was the employer of plaintiff, and that

plaintiff's sole remedy against it was in workmen's compensation, La. R.S. 23:1032.[1] By the time of trial, the only remaining defendants were T. Clayton Price and Commercial Union Assurance Company.[2] [Footnote omitted.]

At trial, defendants moved for a directed verdict at the close of plaintiff's case. The motion for a directed verdict was denied by the trial court. The defendants put on no additional evidence, and the case was submitted to the jury. The jury returned a verdict for the plaintiff. The defendants then moved the trial court grant a new trial on the issue of liability, arguing that the jury verdict in favor of plaintiff was clearly contrary to the law and evidence, pursuant to La.C.C.P. art. 1972. Motion for a new trial on these grounds was granted by the trial court. Because no appeal lies from the granting of a motion for a new trial since same is not a final judgment, the plaintiff applied for supervisory writs to this court, alleging that he would sustain irreparable injury if forced to go through another trial. This court granted a writ of certiorari and ordered the record to be transmitted from the trial court. All proceedings in the trial court where held in abeyance pending this court's determination of the propriety of the trial court's actions under the unique circumstances presented.

1. Suit against an 'executive officer' for negligence is available to plaintiff because the injury occurred prior to the 1976 amendments to La. R.S. 23:1032, the exclusive remedy provision."

Thereafter, in *Pellerin v. Tudor Const. Co.*, supra, the writ of certiorari previously issued was recalled by this

court and the cause was remanded to the trial court for a new trial, as per judgment of the trial court dated May 19, 1981. On February 24, 1984, the new trial was conducted solely on the issue of liability. The jury returned a special verdict finding the defendants liable for negligence and findings no contributory negligence on the part of the plaintiff. The defendants filed a motion for Judgment Notwithstanding the Verdict and in the alternative a motion for new trial. The trial court granted the motion for JNOV and the motion for new trial conditioned on the Court of Appeal reversing the JNOV in favor of the defendants. The trial court stated,

> "The Court is of the opinion, considering all of the evidence in the case, that the plaintiff has not established negligence on the part of the executive officer in this case. The Court is further of the opinion that the evidence clearly establishes that the plaintiff was guilty of gross contributory negligence at the very least in the decision on this case. The Court will, therefore, grant the judgment notwithstanding the verdict and, in the alternative, finding that the findings of the jury were clearly contrary to the law and the evidence, the Court in the alternative would grant a new trial in this matter, although the Court does not see any reason for doing so."

From this judgment the plaintiff appeals.[1]

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[1] The judgment further provided,

"IT IS FURTHER ORDERED that in the event this judgment notwithstanding the verdict is set aside and the order granting a new trial is also set aside by the Court of Appeals, that any subsequent judgment in favor of the plaintiff, James R. Pellerin, recognize that the sum of $35,785.00 has been paid by Commercial Union Insurance Company as compensation benefits and the sum

FACTS

The new trial adduced the following uncontradicted evidence previously set forth in *Pellerin v. Tudor Const. Co.*, supra at 404:

> "The accident from which the suit arose occurred on February 6, 1976. The plaintiff was employed as a carpenter for Tudor Construction Company, which at the time of the accident was engaged in construction of Inglewood Mall in Morgan City. On the Morning of the accident, plaintiff left his residence in Verdunville to travel by car to Morgn City. Weather conditions were rainy and stormy, and plaintiff began to wonder if work were possible that day. Plaintiff returned home to call the work site and find out whether he was to work that day. Plaintiff's wife contacted defendant T. Clayton Price on the telephone. Price informed Mrs. Pellerin that plaintiff should indeed report to work, and plaintiff did so.
>
> After reporting to work, plaintiff was assigned by Price the task of finishing the window frames for an outer wall of a building. This task required plaintiff to work from a scaffold outside of the wall. The scaffold was about 25 feet inside of an overhang roof, but was

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of $28,980.89 in medical benefits has been paid prior to the trial and that said amounts be reimbursed to the intervenor, Commercial Union Insurance Company, with legal interest from date of judicial demand until paid by preference and priority and further that Commercial Union Insurance Company be reimbursed by preference and priority out of any judgment in favor of the plaintiff to the extent of any weekly compensation benefits and/or medical benefits it has paid from the date of the trial until such judgment is satisfied and further that upon the payment of any judgment to the plaintiff, that Commercial Union Insurance Company as intervenor receive credit for the amount of $235,234.00 toward any future compensation payments which may be owed to the plaintiff."

otherwise exposed to the elements. This overhang was approximately 20 feet high.

The wall which plaintiff was working with was approximately five feet high. Plaintiff's task was to do precision work on the window frames which would allow the wall to be completed. The already completed portion of the wall was covered with a sheet of visqueen for protection. The visqueen was held in place by a number of bricks on top of the wall. Plaintiff used a scaffold to finish the window frames. He was assisted in his task by a helper. The helper's job was to move the scaffold along the wall as requested by the plaintiff. Plaintiff ordinarily climbed down from the scaffold while it was being moved by the helper. However, just before the work was completed, the plaintiff elected to step from the scaffold onto the visqueen-covered wall. In so doing, the plaintiff tripped over one of the bricks holding down the visqueen, and fell headfirst to the floor inside the wall, causing him serious injuries."

In addition, it was shown a terrazzo floor was being installed inside the visqueen-covered wall. The visqueen had been placed upon the wall to protect the wall from the spray of water and particles which resulted from the grinding operations conducted to complete the terrazzo floor.

The plaintiff testified he stepped onto the wall because the scaffolding ladder could no longer be employed to descend when the scaffold was moved. The ladder became unusable, according to plaintiff, because moisture had accumulated on the floor and every time plaintiff climbed back onto the scaffold the ladder became more slippery and dangerous. The plaintiff believed he had no

choice, because of the unavailability of any alternative to the slippery ladder, but to climb onto the wall so the scaffold could be moved or he would have unable to complete his job.

T. Clayton Price, the executive officer, testified he inspected the plaintiff's work site at 7:00 A.M. Although it had been raining earlier in the morning, Mr. Price stated, the presence of water was insignificant and would not have prevented plaintiff from performing his job. Further, Mr. Price testified, the plaintiff was provided with a scaffolding to work on because Mr. Price intended and anticipated this to be the safe method for the plaintiff to perform his job. The plaintiff was never authorized by anyone to use the wall to perform his job because there was a danger of damaging the work and it was a hazardous material to stand on because of its slick nature. Mr. Price stated alternative means of getting up and down from the scaffolding were available in the form of several stepladders maintained on the jobsite. Further, Mr. Price stated the plaintiff might have laid down on the scaffold enabling it to be moved safely. The plaintiff was provided with a helper to assist him in obtaining whatever was necessary to complete his work.

Mr. Philip Frederick, Jr., the plaintiff's helper, testified he would have performed any task the plaintiff required of him including obtaining a stepladder; drying off the scaffold ladder rungs; or helping the plaintiff down. Further, Mr. Frederick testified both he and the plaintiff were instructed not to step on the wall if at all possible because the mortar was not yet dry. However, it must be noted Mr. Frederick is the brother-in-law of Mr. Lynn Guidry, the present superintendent for Tudor Construc-

tion, and drove to the trial with him. In addition, Mr. Frederick's testimony at trial was contradicted by prior testimony on several points including whether it was raining on the day of the accident and whether the scaffolding was dry or not.

Mr. Lynn Guidry, then the assistant superintendent on the job where the plaintiff was injured, testified he informend the plaintiff specifically not to step on the brick wall covered with visqueen because it was green (not yet set). Mr. Guidry stated no stepladders were located in the area where the plaintiff was working.

JNOV

La. Code Civ. P. art. 1811 allows a party to move for a judgment notwithstanding the verdict. A JNOV is appropriate only when the evidence points so strongly and overwhelmingly in favor of the moving party reasonable men could not arrive at a contrary verdict on the facts at issue. *Menard v. King,* 469 So.2d 15 (La. App. 1st Cir. 1985).

In this instance the facts at issue give rise to the following questions: Was the executive officer negligent; if so was this negligence causative of the accident; was the employee contributorily negligent; if so, was this contributory negligence a cause of the accident.[2]

THE NEGLIGENCE OF THE EXECUTIVE OFFICER

Whether there is actionable negligence providing a

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2 The plaintiff's accident occurred on February 6, 1976, prior to the adoption of comparative negligence by the legislature.

basis for an executive officer tort suit is to be determined under general tort principles. *Batiste v. Robillard,* 401 So.2d 1267 (La. App. 1st Cir. 1981).

A statutory guideline for determining the duty as to safety owed by an employer to an employee is found in LSA-R.S. 23:13 which provides:

> "Every employer shall furnish employment which shall be reasonably safe for the employees therein. They shall furnish and use safety devices and safeguards, shall adopt and use methods and processes reasonably adequate to render such employment and the place of employment safe in accordance with the accepted and approved practice in such or similar industry or places of employment considering the normal hazard of such employment, and shall do every other thing reasonably necessary to protect the life, health, safety and welfare of such employees. Nothing in this Section shall apply to employment in private domestic services or to agricultural field occupations."

T. Clayton Price was, by his own admission, deligated by his employer the duty to maintain the premises of the construction site at Inglewood Mall in a safe and workman-like condition. Cf. *Billedeaux v. Adams,* 355 So.2d 1345 (La. App. 3d Cir. 1978), *writ denied,* 358 So.2d 640 (La. 1978), on the issue of executive officer liability. Mr. Price did maintain he performed an inspection of the site at 7:00 A.M. determining the presence of water about the scaffolding to be minimal and not an impediment to the plaintiff's job performance.

However, it is clear to this court it was raining on the day of the plaintiff's accident. The plaintiff stated this rain accumulated on the floor of his job site and consequently on the ladder rungs of his scaffold. Mr. Frederick was inconsistent with his prior testimony when he stated it was not raining that day and this inconsistency was brought to the attention of the jury. Further, the jury might have inferred the spray from the terrazzo work found its way to the scaffolding side of the brick wall.

In determining whether a JNOV is appropriate the trial court may not substitute its own credibility evaluations for that of the jury. *Menard v. King, supra.* From the evidence presented reasonable men could have found the work premises to be wet and that it is negligence, regardless of safeguards or alternative, to require an individual work on a scaffolding under such circumstances. Therefore, it would be erroneous for the trial court to grant a JNOV on the issue of the executive officer's negligence. It must now be determined whether the executive officer's action in requiring the plaintiff to work at wet premises was the cause of the accident or whether a different or contributing cause has been shown. To do so, consideration must be focused upon the issue of the plaintiff's negligence during which the presence of safeguards and alternatives will be weighed.

THE CONTRIBUTORY NEGLIGENCE OF THE INJURED EMPLOYEE

In *Martinez v. U.S. Fidelity and Guar. Co.*, 423 So.2d 1088 (La. 1982), the court states, p. 1090:

"The standard for contributory negligence in employee executive officer suits was correctly set

forth in *Miller v. Employers Mutual Liability Insurance Co.*, 349 So.2d 1353 (La. App. 2d Cir. 1977):

'Emerging as criteria for determing an employee's contributory negligence are: (1) relative knowledge of the danger by the supervising employee and the injured employee; (2) relative control over the employee's situation; (3) the degree to which the employee's conduct is voluntary on his part; (4) alternatives available to the employee; (5) obviousness of the danger; and (6) relative ability to eliminate the danger.' "

The *Martinez* court makes no mention of the standard set forth in *Billedeaux*, supra at 1348, in which the Third Circuit Court of Appeal stated:

"For an employee to be held contributorily negligent and/or to have assumed the risk of the harm which ultimately resulted in his injury, the defendant must prove, by a preponderance of the evidence, that the plaintiff voluntarily and knowingly exposed himself to the danger which resulted in his injury. That determination requires a dual finding of (1) a known and obvious danger and (2) a readily available reasonable alternative."

Therefore, we are of the opinion the *Martinez* court has rejected the channelized *Billedeaux* standard for the broader *Miller* standard.[3]

Since the *Martinez/Miller* standard weighs all the circumstances of the employee's conduct it becomes

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3 Both appeal counsel provide in brief the *Billedeaux* standard is the proper one for this court to apply on review.

more difficult for a court to use the JNOV procedure to overturn a jury verdict than it would if the *Billedeaux* standard were employed. Once an obvious danger is found *Billedeaux* only requires an inquiry into whether an employee had reasonable alternatives as opposed to *Martinez/Miller* which inquires into several factors simultaneously. Therefore, under *Martinez/Miller* a reviewing court can not ascertain with as much certainty the specific reason for a jury's finding on the issue of an employee's contributory negligence. This requires the exercise of an even greater restraint before the judgment of a reviewing court can be substituted for that of the original trier of fact.

Nonetheless, in this instance it is uncontradicted the injury was caused by the plaintiff's stepping from the scaffolding onto a loose brick holding down the sheet of visqueen covering the wall, losing his footing and falling. We agree with the trial court this election to step on the wall by the plaintiff is contributory negligence which as a matter of law bars the plaintiff's recovery. The rendering of the JNOV by the court was correct.

The plaintiff was under no compulsion to step to the wall so the scaffolding could be moved. In fact, several individuals testified the plaintiff was warned not to step on the wall. Further, it is obvious a sheet of visqueen with a film of moisture on it is going to be quite slippery. The plaintiff knew of this danger and yet he attempted to step on the wall anyway. The plaintiff contends he had to step on the wall because he could not use the scaffolding ladder which was wet. However, several more reasonable methods to eliminate the danger of a wet ladder were available, foremost amongst them was asking the helper, Mr.

Frederick, to render aid in some form. The palintiff's step to the wall was a simple expedient to avoid dismounting the scaffolding. It was an expedient which was dangerous and chosen with a lack of care. The record establishes the step was a voluntary action on the part of the plaintiff, an action which the executive officer had sought to avoid. The plaintiff clearly deviated from proper procedure and the intended method for performing his job. Therefore, in spite of the wet working conditions we find the plaintiff's action in stepping onto the wall to be the actual cause of the accident. The evidence points so strongly and overwhelmingly in favor of the moving party on this factual issue, reasonable men could not arrive at a contrary verdict. Accordingly, we affirm the JNOV rendered by the trial court.

Costs on appeal are assessed against appellant.

AFFIRMED.

APPENDIX B

The Supreme Court of the State of Louisiana

James R. Pellerin
VS. No. 86-C-0199
TUDOR CONSTRUCTION COMPANY ET AL

IN RE: Pellerin, James R.; Applying for Writ of Certiorari and/or Review; to the Court of Appeal, First Circuit, Number CA/84/1018; Parish of St. Mary 16th Judicial District Court Div."B" Number 53,180

March 7, 1986
Denied.

WFM
JAD
FAB
JCW

CALOGERO, DENNIS & LEMMON, J.J., would grant the writ.

Supreme Court of Louisiana
March 7, 1986

/s/ Frans J. Labranche, Jr.
Clerk of Court
For the Court